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ISSUE NO. 11 – JUNE 6, 2025

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DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

NOTICE OF PROPOSED RULEMAKING

MAR NOTICE NO. 2025-523.1

Summary

Proposed amendment of ARM 37.34.912, 37.40.1407, and 37.90.408 and adoption of NEW RULE 1 pertaining to Home and Community-Based Services Program and Electronic Visit Verification Requirements

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Hearing Date and Time

Friday, June 27, 2025, at 9:00 a.m.

Virtual Hearing Information

Join Zoom Meeting

https://mt-gov.zoom.us/j/81740663908?pwd=BvjnrDiFVHAbgrfemBCRvh4a0JRYpH.1

Meeting ID: 817 4066 3908 and Password: 440714

Dial by Telephone +1 646 558 8656, Meeting ID: 817 4066 3908 and Password: 440714

Find your local number: https://mt-gov.zoom.us/u/kbnhO3L4sA

Comments

Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to the contact information listed below. Comments must be received by Monday, July 7, 2025, at 5:00 p.m.

Accommodations

The agency will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. Requests must be made by Friday, June 20, 2025, at 5:00 p.m.

Contact

Bailey Yuhas
(406) 329-7913
hhsadminrules@mt.gov
Fax: (406) 444-9744

Rulemaking Actions

AMEND

The rules proposed to be amended are as follows, stricken matter interlined, new matter underlined:

37.34.912 0208 MEDICAID HOME AND COMMUNITY-BASED SERVICES PROGRAM: PROVIDER REQUIREMENTS

(1) The Developmental Disabilities Program 0208 Comprehensive Waiver Provider Manual, dated July 1, 2024, sets forth the qualifications and standards that govern the qualified provider and service delivery processes.

(a) The department adopts and incorporates by reference the Developmental Disabilities Program 0208 Comprehensive Waiver Provider Manual, dated July 1, 2024.

(b) A copy of the Developmental Disabilities Program 0208 Comprehensive Waiver Provider Manual may be obtained through the Department of Public Health and Human Services, Developmental Disabilities Program, 111 N. Sanders, P.O. Box 4210, Helena, MT 59604-4210.

(2) A provider must ensure that services adhere to the requirements of [NEW RULE 1].

Authorizing statute(s): 53-6-113, 53-6-402, MCA

Implementing statute(s): 53-6-101, 53-6-402, MCA

37.40.1407 HOME AND COMMUNITY-BASED SERVICES FOR ELDERLY AND PHYSICALLY DISABLED PERSONS: GENERAL REQUIREMENTS

(1) Services of the program may only be provided by a provider that is enrolled with the department as a Medicaid provider or, in rare instances, through a provider with whom the department is contracting for home and community-based case management services.

(2) A facility providing services to a recipient must meet all licensing requirements including fire and safety standards as well as other service-specific requirements set forth by the department in this chapter.

(3) A provider of services must ensure that the services adhere to the requirements of 42 CFR 441.301(c)(4), which permits reimbursement with Medicaid monies only for services within settings that meet certain qualities set forth under the regulation. These qualities include that the setting:

(a) is integrated in and facilitates full access of the individual to the greater community;

(b) ensures the individual receives services in the community to the same degree of access as individuals not receiving Medicaid Home and Community-Based Services;

(c) is selected by the individual from among setting options, including non-disability specific settings and an option for a private unit in a residential setting;

(d) ensures the individual's rights of privacy, dignity, and respect, and freedom from coercion and restraint;

(e) supports health and safety based upon the individual's needs, decisions, or desires;

(f) optimizes, but does not regiment, individual initiative, autonomy, and independence in making life choices, including, but not limited to daily activities, physical environment, and with whom to interact;

(g) provides an opportunity to seek employment and work in competitive integrated settings; and

(h) facilitates individual choice of services and supports, and who provides them.

(4) A provider of services must meet the requirements necessary for the receipt of reimbursement with Medicaid monies.

(5) A provider must ensure that services adhere to the requirements of [NEW RULE 1].

~~(5)~~(6) Immediate family members and legally responsible individuals may be paid for the provision of certain services under the following conditions:

(a) the service is identified in the federally approved waiver;

(b) the service is specified in the individual's service plan;

(c) the family member or legally responsible individual meets the provider qualifications and training standards for that service as specified in the federally approved waiver;

(d) the services do not supplant tasks that are customarily performed by legally responsible individuals; and

(e) the family member or legally responsible individual may not provide more than 40 hours of service in a seven-day period.

~~(6)~~(7) Immediate family members include:

(a) a spouse; and

(b) a natural or adoptive parent of a minor child.

~~(7)~~(8) A provider may also provide support to other family members in the recipient's household during hours of program reimbursed service if approved by the case management team or FM.

~~(8)~~(9) The department adopts and incorporates by reference 42 CFR 441.301(c)(4), as amended January 16, 2014. A copy of this regulation may be obtained at https://www.ecfr.gov/ or by contacting the Department of Public Health and Human Services, Senior & Long-Term Care Division, 1100 N. Last Chance Gulch, P.O. Box 4210, Helena, MT 59604-4210.

Authorizing statute(s): 53-2-201, 53-6-101, 53-6-113, 53-6-402, MCA

Implementing statute(s): 53-2-201, 53-6-101, 53-6-402, MCA

37.90.408 HOME AND COMMUNITY-BASED SERVICES FOR ADULTS WITH SEVERE AND DISABLING MENTAL ILLNESS: REIMBURSEMENT

(1) The department adopts and incorporates by reference the Medicaid Home and Community-Based Services for Adults with Severe and Disabling Mental Illness fee schedule. Unless otherwise provided for in rule, the provider reimbursement rate

for waiver program services is stated in the department's fee schedule as provided in ARM 37.85.105(5)(b). These fees are calculated based on:

(a) the biennial legislative appropriation; and

(b) the estimated demand of covered services during the biennium.

(2) Medicaid reimbursement for the SDMI HCBS waiver program will be the lesser of:

(a) the provider's usual and customary charge for the service; or

(b) the rate established in the department's Medicaid fee schedule adopted and incorporated into ARM 37.85.105(5)(b).

(3) The SDMI HCBS waiver program is the payor of last resort and will not reimburse a service that otherwise is or should be paid by another source.

(4) The SDMI HCBS waiver program will not reimburse for services provided to individuals of an enrolled member's household or family.

(5) All SDMI HCBS services, except for case management, must be prior authorized before delivery of services. Services that are delivered before prior authorization is received will not be approved and, if reimbursed, may be subject to repayment.

(6) A provider must ensure that services adhere to the requirements of [NEW RULE 1].

Authorizing statute(s): 53-2-201, 53-6-402, MCA

Implementing statute(s): 53-6-402, MCA

ADOPT

The rule proposed to be adopted is as follows:

NEW RULE 1 ELECTRONIC VISIT VERIFICATION REQUIREMENTS

(1) Montana Medicaid providers that provide home and community-based services subject to federal Electronic Visit Verification (EVV) requirements must ensure an EVV system is used to electronically document the delivery of EVV services and submit claims.

(2) Each EVV visit transaction must contain the following data elements, as required by section 12006 of the 21st Century Cures Act, Pub. L. No. 114-225 (Dec. 13, 2016), as codified at 42 U.S.C. 1396b(*l*)(l) & (5)(A), for:

(a) the type of service provided;

(b) the name of the member who received the service;

(c) the name of the service provider who provided the service;

(d) the date of the service;

(e) the time the service began and ended; and

(f) the location, including the address, at which the service was provided.

(3) In addition to the requirements listed in (2), the department may request additional information deemed necessary to ensure the accurate payment of a claim for services.

(4) EVV is a requirement for all members utilizing home and community-based services subject to federal EVV requirements, including those who have a live-in caregiver.

Authorizing statute(s): 53-2-201, MCA

Implementing statute(s): 53-2-201, 53-6-113, MCA

General Reasonable Necessity Statement

The Department of Public Health and Human Services (department) is proposing to adopt NEW RULE 1 and amend ARM 37.34.912, 37.40.1407, and 37.90.408.

This rulemaking is necessary to ensure that Montana Medicaid providers that provide Home and Community Based Services (HCBS) are in compliance with the Federal Electronic Visit Verification (EVV) requirements as set forth in Section 12006 of the 21st Century Cures Act, 42 U.S.C. 1396b(*l*)(1) & (5)(A). The rule sets for the Big Sky Waiver (BSW), Severe Disabling Mental Illness (SDMI) Waiver, and 0208 Waiver do not currently reflect these requirements. Accordingly, the department proposes to adopt NEW RULE 1 to outline the federal EVV requirements for HCBS providers and to amend ARM 37.34.912, 37.40.1407, and 37.90.408 to reference the requirements of NEW RULE 1.

<u>NEW RULE 1</u>
NEW RULE 1 would require HCBS providers to ensure an EVV system is used to electronically document the delivery of EVV services and submit claims. This rule would also list data elements each EVV visit transaction must include, as established by federal law, and requires that all members receiving HCBS services be compliant.

ARM 37.34.912, 37.40.1407, and 37.90.408

The proposed amendment to these rules would add a section requiring compliance with proposed NEW RULE 1.

Fiscal Impact

The department does not anticipate a fiscal impact.

Interested Persons

The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Written requests may be mailed or delivered to the contact person listed above.

Bill Sponsor Notification

Bill sponsor contact requirements do not apply.

Small Business Impact

The department has determined that the class of small businesses affected by this proposed rulemaking are those businesses providing HCBS Waiver services or fiscal management services. The department does not believe the proposed rulemaking will have a probable significant and direct impact on these small businesses given that the department has selected the Open Vendor model for EVV, offering small businesses an EVV system that is free to providers who need a system.

Medicaid Performance-Based Statement

Section 53-6-196, MCA, requires that the department, when adopting by rule proposed changes in the delivery of services funded with Medicaid monies, make a determination of whether the principal reasons and rationale for the rule can be assessed by performance-based measures and, if the requirement is applicable, the method of such measurement. The statute provides that the requirement is not applicable if the rule is for the implementation of rate increases or of federal law.

The department has determined that the proposed program changes presented in this notice are not appropriate for performance-based measurement and therefore are not subject to the performance-based measures requirement of 53-6-196, MCA.

Rule Reviewer

Bree Gee

Approval

Charles T. Brereton, Director

Department of Public Health and Human Services

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PUBLIC EMPLOYEES' RETIREMENT BOARD

NOTICE OF ADOPTION

MAR NOTICE NO. 2025-1.2

Summary

Amendment of ARM 2.43.2101 pertaining to membership

Previous Notice(s) and Hearing Information

On January 10, 2025, the Public Employees' Retirement Board published MAR Notice No. 2025-1.1 pertaining to the proposed amendment of the above-stated rule in the 2025 Montana Administrative Register, Issue Number 1.

No public hearing was held or requested.

Final Rulemaking Action – Effective June 7, 2025

AMEND AS PROPOSED

The agency has amended the following rule as proposed:

2.43.2101 MEMBERSHIP

Statement of Reasons

No comments were received.

Contact

Kris Vladic
406-444-2578
kvladic@mt.gov
Fax: 406-444-5428

Rule Reviewer

Nicholas Domitrovich, Chief Legal Counsel

Approval

Maggie Peterson

President
Public Employees' Retirement Board

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DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES

NOTICE OF ADOPTION

MAR NOTICE NO. 37-1110

Summary

Amendment of ARM 37.27.902, 37.85.105, and 37.88.101 pertaining to updating Medicaid and non-Medicaid provider rates, fee schedules, and effective dates

Previous Notice(s) and Hearing Information

On December 20, 2024, the Department of Public Health and Human Services published MAR Notice No. 37-1110 pertaining to the public hearing on the proposed amendment of the above-stated rules at page 2629 of the 2024 Montana Administrative Register, Issue Number 24. A supplemental notice was published on February 21, 2025, in Issue Number 4 of the 2025 Montana Administrative Register, extending the comment period to March 21, 2025.

A hearing was held on January 13, 2025.

Final Rulemaking Action – The department intends to apply the rule amendments retroactively to January 1, 2025.

AMEND AS PROPOSED

The department has amended the following rules as proposed:

37.27.902 SUBSTANCE USE DISORDER SERVICES: AUTHORIZATION REQUIREMENTS

37.85.105 EFFECTIVE DATES, CONVERSION FACTORS, POLICY ADJUSTERS, AND COST-TO-CHARGE RATIOS OF MONTANA MEDICAID PROVIDER FEE SCHEDULES

NOT ADOPTING

The department has decided not to amend the following rule as proposed:

37.88.101 MEDICAID MENTAL HEALTH SERVICES FOR ADULTS, AUTHORIZATION REQUIREMENTS

Statement of Reasons

The agency has considered the comments and testimony received. A summary of the comments received, and the agency's responses are as follows:

COMMENT #1: A commenter asked if the removal of case management in Policy 530 as a service component means providers can bill for targeted case management concurrently with ASAM 2.5.

RESPONSE #1: Case management must be made available to members receiving ASAM 2.5 services. However, it is not a skilled treatment service and does not count towards the required hours. It is billable concurrently.

COMMENT #2: A commenter requested the proposed changes in Policy 530, ASAM level 2.5, Service Requirements #8 and #9, which removed case management as a service component, be added to Policy 525, ASAM 2.1 services.

RESPONSE #2: The department thanks the commenter for the comment. The changes noted were proposed changes to Policy 525 in MAR Notice No. 37-1104. The department had overlooked Policy 530 at the time of that rulemaking and included it with this rulemaking upon receiving a comment during the previous rulemaking. The adoption notice can be found at: https://dphhs.mt.gov/assets/rules/37-1104adp-arm.pdf.

COMMENT #3: A commenter asked if case management must be made available to all members receiving ASAM 2.5 services. The commenter also asked if it is a separately billable service that does not count towards the required 20 hours for ASAM 2.5.

RESPONSE #3: Yes, it is correct that case management must be made available to members receiving ASAM 2.5 services. It does not count toward the required 20 hours for ASAM 2.5. It is a separately billable service.

COMMENT #4: A commenter recommended adding clarification to Policy 600 regarding reimbursement rules. The commenter indicated the policy suggests there are other reimbursement rules separate from the policies in this rulemaking and asked if providers bill according to the proposed fee schedule or some other fee schedule.

RESPONSE #4: HEART Waiver services are separate from other BHDD policies. The department will amend the language to clarify that HEART Waiver Services must be billed according to the proposed Medicaid Mental Health services for individuals 18 years of age and older provider fee schedule. However, it is important to note that, in order to remain Medicaid providers in good standing and eligible for Medicaid reimbursement, such providers remain subject to the state and federal Medicaid requirements applicable to their provider type(s). That is the intended meaning of the statement in Policy 600 concerning compliance with provider type reimbursement rules. ARM 37.85.401 states that, as a condition of participation in the Montana Medicaid Program, all providers must comply with all applicable state and federal statutes, rules, and regulations, including federal regulations and statutes found in Title 42 of the Code of Federal Regulations and the United States Code governing the Medicaid Program and all applicable Montana statutes and rules governing licensure and certification. Thus, for example, tenancy support services are authorized for reimbursement under a Medicaid waiver as a home and community-based service and providers seeking reimbursement for such services are required to comply with the applicable settings requirements set forth in 42 CFR 441.301(c)(4) and reporting of critical incidents defined in 42 CFR 441.302(a)(6)(i)(A).

COMMENT #5: A commenter asked if the language in Policy 603 requiring members to be referred for tenancy support services and the referral form being made available on the department website or through the department's designee means all individuals referred to TSS will be referred to work with someone from the state.

RESPONSE #5: Members who need tenancy support services must be referred by using the form or calling Mountain Pacific, which is contracted with the department to perform utilization management. Mountain Pacific completes an eligibility assessment screening, which is the process that determines if the member meets established criteria to participate in Tenancy Support Services. The department will amend the language to clarify that eligibility is determined by Mountain Pacific, which is also performing utilization management for other Medicaid services.

COMMENT #6: A commenter asked whether case managers will continue to connect members with housing resources, or be required to make referrals to the department's designee for the member to receive tenancy support services.

RESPONSE #6: Case managers may still connect members with housing resources as part of assisting members in gaining access to needed medical, social, educational, and other services. If the member is receiving targeted case management, service requirements are listed in Policies 405 and 510 of the BHDD Medicaid Provider Manual. Tenancy Support Services (TSS) are a waiver service with separate criteria and if a member receives TSS, providers must adhere to Policy 605.

COMMENT #7: A commenter asked if the state is the only organization working with people for Tenancy Support Service or can organizations hire tenancy specialists?

RESPONSE #7: The state does not provide direct services. To be reimbursed for Tenancy Support Services, qualified providers must employ a Tenancy Support Specialist that meets one of the following requirements:

(a) Associate degree in human services, social services, public health, or related field from an accredited college or university; or

(b) High school graduate or High School Equivalency (GED or HiSET), along with one year of relevant work experience, as determined by the service providing agency.

COMMENT #8: A commenter asked the department to identify the independent contractor referenced in Policy 603. The commenter asked if the independent contractor is a person with the state or are the tenancy specialists that organizations hire, being referenced as independent contractors.

RESPONSE #8: The department's current independent contractor is Mountain Pacific. Mountain Pacific is a Quality Improvement Organization (QIO) contracted by the department to provide utilization management for Medicaid services. The department will amend language in Policy 603 to clarify the Utilization Review contractor means Mountain Pacific, the contracted QIO.

COMMENT #9: The department received a number of comments on Contingency Management (CM). These comments included questions on the unit of service for CM, which StimUD services can be reimbursed concurrently with CM services, and other questions on the fee schedule and/or the CM policies. For example, a commenter recommended the department add clarification regarding the proposed fee schedule because there is no indication of what constitutes one unit for contingency management (e.g., per 15 minutes, per session, per encounter, etc.). The commenter noted that some providers need more than 15 minutes to complete a contingency management (CM) session with a member, and if the CM session is at least 22 minutes in length, they bill for two 15-minute CM session increments.

RESPONSE #9: The department welcomes and thanks the public for their comments on providing reimbursement for Contingency Management Services. In addition to the lack of clarity identified by the comments referenced above, the department identified an error with the proposed contingency management reimbursement that needs to be addressed outside of this rulemaking. As a result, contingency management will be removed from the fee schedule proposed in this rulemaking to allow the department time to improve its CM policies and to clarify and/or correct issues with respect to CM reimbursement. Reimbursement for tenancy support services will proceed as proposed. Therefore, the department is not adopting ARM 37.88.101 in this rulemaking.

As noted above, the department received several comments asking for additional clarification related to Contingency Management services as outlined in Policy 610 and the references to Contingency Management in Policy 505. The department will include the above-mentioned Contingency Management policies in a rulemaking in the near future. The department will

consider the comments it received on Contingency Management as it updates and clarifies its policies and reimbursement requirements on Contingency Management services for that rulemaking.

COMMENT #10: A commenter asked if the reimbursement for family therapy could be increased.

RESPONSE #10: The procedure codes for family therapy are found on the proposed resource-based relative value scale (RBRVS) fee scheduled. The department uses the reimbursement methodology described in ARM 37.85.212. To ensure consistency across services through a developed rate methodology, the department cannot consider an increase at this time.

Contact

Bailey Yuhas
(406) 329-7913
hhsadminrules@mt.gov
Fax: (406) 444-9744

Rule Reviewer

Bree Gee

Approval

Charles T. Brereton, Director

Department of Public Health and Human Services

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SECRETARY OF STATE

NOTICE OF ADOPTION

MAR NOTICE NO. 2025-33.2

Summary

This rulemaking proposes the waiver of the 2026 and 2027 Annual Report Fees for all businesses registered in Montana.

Previous Notice(s) and Hearing Information

On February 21, 2025, the Secretary of State published MAR Notice No. 2025-33.1 pertaining to the public hearing on the proposed amendment of the below-stated rule in Issue 4 of the Montana Administrative Register. A public hearing was held on March 17, 2025.

Final Rulemaking Action – Effective June 7, 2025

AMEND AS PROPOSED

The agency has amended the following rule as proposed:

44.5.303 ANNUAL REPORT FEE WAIVERS

Statement of Reasons

The agency has considered the comments and testimony received. A summary of the comments received, and the agency's responses are as follows:

Comment 1: The President/CEO of the Montana Chamber of Commerce provided written comments noting full support of the adoption of the proposed amendment pertaining to business services annual report filing fee waiver for the 2026 and 2027 calendar years. The Montana Chamber of Commerce congratulates the Secretary of State for finding efficiencies

and improving government services to the point it can waive the annual business services filing fee.

Response 1: The Secretary of State appreciates the support and opportunity to further serve the businesses of Montana.

Contact

Andy Ritter
(406) 444-7911
andrew.ritter@mt.gov
Montana Relay: 711
Fax: (406) 444-3976

Rule Reviewer

Austin Markus James

Approval

Christi Jacobsen, Secretary of State

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DEPARTMENT OF PUBLIC SERVICE REGULATION
PUBLIC SERVICE COMMISSION OF THE STATE OF MONTANA

DECLARATORY RULING

In re NorthWestern Energy's Petition for a Waiver from Compliance with the Community Renewable Energy Project Purchase Obligation for Calendar Year 2016	Montana Public Service Commission Docket D2016.4.33 Docket D2017.8.65
In re NorthWestern Energy's Consolidated Petition for a Waiver from Compliance with the Community Renewable Energy Project Purchase Obligation for Calendar Year 2015 and for a Declaratory Ruling Regarding the Administrative Penalty contained in Mont. Code Ann. § 69-3-2004(10)	May 22, 2025

Background

1. In 2005, the Montana Legislature enacted the Montana Renewable Power Production and Rural Economic Development Act ("the Act"). *See* Mont. Code Ann. §§ 69-3-2001 through -2008 (2019).[1] The Act required public utilities to purchase a certain amount of electricity output from Community Renewable Energy Project ("CREP") resources each year. *Id*. at § 69-3-2004(3)(b)-(4)(b). Under the Act, if a utility failed to meet its yearly CREP purchase obligation, and no waiver of that obligation was granted by the Montana Public Service

[1] The Act was repealed in 2021. Sec. 5, Ch. 542, L. 2021.

Commission ("Commission" or "PSC"), the utility was subject to an administrative penalty. *Id*. at § 69-3-2004(10).

2. On December 20, 2016, in Docket No. D2016.4.33, NorthWestern Corporation d/b/a NorthWestern Energy ("NorthWestern") filed with the Commission a petition for waiver of its 2015 CREP purchase obligation.[2] On August 18, 2017, in Docket No. D2017.8.65, NorthWestern filed a petition for waiver of its 2016 CREP purchase obligation. On October 24, 2017, the Commission voted to consolidate both petitions. Final Order 7578b ("Order 7578b") ¶ 1 (Sept. 24, 2018).

3. The Montana Environmental Information Center ("MEIC"), among others, was subsequently granted intervention in the proceedings. Notice of Staff Action Granting Intervention 1 (Nov. 20, 2017).

4. On September 24, 2018, the Commission issued Order 7578b, which granted waivers to NorthWestern for its CREP purchase obligation for compliance year[3] 2015 and compliance year 2016. Order 7578b ¶¶ 6, 18. The Commission also waived administrative penalties for those compliance years. *Id.* ¶ 19.

5. In November 2018, MEIC petitioned for judicial review of Order 7578b. *MEIC v. Mont. Dep't of Pub. Serv. Reg.* ("*MDPSR*"), Cause No. DDV-18-0640, Complaint & Petition for Judicial Review (Mont. 8th Jud. Dist. Ct. Sept. 24, 2018). The District Court reversed Order 7578b, finding the Commission erred in waiving NorthWestern's CREP purchase obligation for compliance years 2015 and 2016. *MEIC v. MDPSR*, Cause No. DDV-18-0640, Order Reversing Montana Public Service Commission Final Order 7578b ("Reversal Order") (Mont. 8th Jud. Dist. Ct. Aug. 1, 2019). Both the Commission and NorthWestern appealed the Reversal Order. *MEIC v. MDPSR*, 2021 Mont. LEXIS 698 at 1.

6. While the appeal of the Reversal Order was pending before the Montana Supreme Court ("Court"), the Montana Legislature enacted House Bill ("HB") 576, which repealed the Act in its entirety effective May 14, 2021. HB 576, 67th Leg. (Mont. 2021). HB 576 contained both a savings clause and a retroactivity clause. They read as follows:

> Section 7. Saving clause. [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].
>
> * * *

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[2] Consolidated with the mentioned petition was a petition for a declaratory ruling regarding the CREP administrative penalty set forth in Mont. Code Ann. § 69-3-2004(10). That petition was withdrawn. *See* Order 7578b ¶ 5.

[3] The "compliance year" is the calendar year beginning January 1 and ending December 31. Mont. Code Ann. § 69-3-2003(6).

> Section 12. Retroactive applicability. [This act] applies retroactively, within the meaning of 1-2-109, to any application pending or commenced before the public service commission prior to [the effective date of this act].

Id. §§ 7, 12.

7. Consequently, on September 7, 2021, the Court remanded the Reversal Order appeal to the District Court with instructions to address whether HB 576 affected the Commission's authority to assess administrative penalties for noncompliance with CREP obligations occurring prior to May 14, 2021. *MEIC v. MDPSR*, 2021 Mont. LEXIS 698 at 1-2. The Court also dismissed the appeal of the Reversal Order without prejudice. *Id*. at 2.

8. On remand, the District Court concluded that HB 576 did not moot the litigation involving MEIC's request for judicial review of Order 7578b or the Reversal Order because the savings clause in HB 576 protected the matter from the retroactive application of HB 576. *MEIC v. MDPSR*, Case No. DDV-2018-640, Order Denying Defendants' Mot. to Dismiss and Order Enforcing Judgment ("Order Enforcing Judgment") ¶ 23 (Mont. 8th Jud. Dist. Ct. May 9, 2022). The District Court also determined that NorthWestern was obligated to pay an administrative penalty for the violation of its 2015 and 2016 CREP purchase obligations, and in turn, assessed a penalty under Mont. Code Ann. § 69-3-2004(10) against NorthWestern. *Id*. ¶¶ 25, 28. Once again, both the Commission and NorthWestern appealed.

9. On appeal, the Court considered both the Reversal Order and the Order Enforcing Judgment in a consolidated appeal. *See MEIC v. MDPSR*, 2024 MT 56, 415 Mont. 499, 545 P.3d 69 ("CREP Decision"). The Court ultimately determined, based on various grounds, that the District Court had erroneously assessed a penalty under Mont. Code Ann. § 69-3-2004(10) against NorthWestern for its 2015 and 2016 CREP purchase obligations. *Id*. ¶ 76. It thus remanded the matter to the District Court, with instructions for the Commission to assess a penalty against NorthWestern for noncompliance of its CREP purchase obligation for compliance year 2015 and, if applicable, following further Commission proceedings on remand,[4] for compliance year 2016. *Id*.

10. On October 23, 2024, MEIC and NorthWestern jointly moved the Commission for a declaratory ruling addressing two questions associated with the Court's remand directive:

a. Does the Act's now-repealed penalty provision, Mont. Code Ann. § 69-3-2004(10) (2019), control the Commission's assessment of a penalty in this case?

[4] The Court's remand to the District Court also directed it to instruct the Commission to make "thorough findings of fact and conclusions of law regarding NorthWestern's compliance or noncompliance with its CREP obligations in 2016." CREP Decision, ¶ 75.

b. If the Act's penalty provision applies, is the Commission strictly limited to using information from (or before) the penalty year, or can information available after the compliance year be used to calculate an appropriate penalty?

MEIC & NorthWestern's Joint Mot. for Declaratory Ruling ("Joint Motion") 2 (Oct. 23, 2024).

11. On November 19, 2024, the Commission issued Procedural Order 7578c, which established a briefing schedule on the questions raised in the Joint Motion and invited public comment on the questions posed.

12. On November 22, 2024, MEIC filed a Brief in Support of Declaratory Ruling ("MEIC's Br.") and NorthWestern filed an Opening Brief in Support of the Joint Motion for Declaratory Ruling ("NorthWestern's Opening Br."). On December 13, 2024, NorthWestern filed a Response Brief in Support of the Joint Motion for Declaratory Ruling ("NorthWestern's Resp. Br."). On December 13, 2024, MEIC filed a Reply Brief in Support of Declaratory Ruling ("MEIC's Reply Br.").

13. All briefing has been completed, and no public comments were received. The Commission now grants the parties' Joint Motion and issues this Declaratory Ruling addressing the questions raised in the Joint Motion.

Declaratory Ruling Standards

14. Any party may seek a declaratory ruling from the Commission when doubt exists as to how a statute affects the party's legal rights. Mont. Admin. R. 1.3.226. The Commission may either deny or approve a request for a declaratory ruling. *See id.* at 1.3.229(2). If denied, the Commission must include in the denial the grounds for denial. *Id*. at 1.3.228. Declaratory rulings, or the refusal to issue such a ruling, are subject to judicial review. Mont. Code Ann. § 2-4-501; Mont. Admin. R. 1.3.229(2).

Discussion

15. In the Joint Motion, the parties state that a Commission decision on the two questions presented in the Joint Motion may help the parties reach a resolution of all matters in this docket without need for further Commission proceedings. Joint Mot. 2. The Commission has previously recognized that public policy favors the resolution of disputes through settlement. *In re NorthWestern Energy's 2011-2012 Electricity Supply Tracker*, Dkt. D2012.5.49, Order 7219i ¶ 14 (May 15, 2014) (citations omitted). Accordingly, the Commission hereby

approves the parties' request for a Declaratory Ruling and addresses below each question posed in the Joint Motion.

I. Does the Act's now-repealed penalty provision, Mont. Code Ann. § 69-3-2004(10) (2019), control the Commission's assessment of a penalty in this case?

16. For the reasons discussed below, the Commission concludes Mont. Code Ann. § 69-3-2004(10) (2019), also referred to herein as the penalty provision, controls the Commission's assessment of a penalty in this case.

17. Mont. Code Ann. § 69-3-2004(10) read, in pertinent part:

> Except as provided in subsections (11) and (12), if a public utility . . . is unable to meet the standards established in subsections (2) through (4) in any compliance year, that public utility . . . shall pay an administrative penalty, assessed by the commission, of $10 for each megawatt hour of renewable energy credits that the public utility . . . failed to procure.

Subsection (11) of Mont. Code Ann. § 69-3-2004 allowed a public utility to petition the Commission for a short-term waiver from its CREP purchase obligations. Mont. Code Ann. § 69-3-2004(11). As indicated above, the Act, which included the penalty provision, was repealed effective May 14, 2021. As also indicated above, HB 576 contained, both a savings clause and a retroactivity clause.

18. MEIC asserts that the savings clause in HB 576 saved the penalty provision from being repealed and therefore Mont. Code Ann. § 69-3-2004(10) controls the Commission's assessment of a penalty against NorthWestern for its noncompliance with CREP obligations. MEIC Br. 12. To support its assertion, MEIC relies on language in the CREP Decision. Specifically, MEIC points to the Court's statement that "the saving clause applies to protect this case from the repeal of the Act." MEIC Br. 13 (quoting CREP Decision ¶ 33). MEIC also asserts that the Court specifically applied the language of the penalty provision when it stated: "The plain language of § 69-3-2004(10), MCA, requires the Commission, not the District Court, to assess any penalty for noncompliance." *Id*. at 12 (quoting CREP Decision ¶ 72).

19. NorthWestern asserts that HB 576's savings clause did not save the penalty provision from repeal and therefore the Commission is not bound by Mont. Code Ann. § 69-3-2004(10) when assessing a penalty against NorthWestern on remand. NorthWestern's Resp. Br. 4. To support its argument, NorthWestern looks to the language of the savings clause, which states the Act does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before May 14, 2021. *See* ¶ 6 *supra*. NorthWestern argues that

none of the conditions that might make the savings clause apply to the penalty provision are present. It asserts that the Commission's duty to impose a penalty did not mature until after the CREP Decision was issued in March 2024, well after the repeal of the Act. NorthWestern's Opening Br. 7. It also maintains that no penalties were incurred prior to the repeal of the Act because "the Commission is the one issuing penalties, not incurring them." *Id*. It further asserts that no "proceedings were begun" before the repeal of the Act because "a penalty proceeding had yet to begin before the May 14, 2021." *Id*.

20. NorthWestern also argues that the Court did not directly address whether the Commission had a duty to penalize NorthWestern, so the CREP Decision is not binding or persuasive authority requiring the Commission to apply the penalty provision on remand. NorthWestern Resp. Br. 6.

21. The Commission disagrees with NorthWestern and concludes the language in the CREP Decision mandates that the Commission assess the penalty for NorthWestern's CREP purchase obligation noncompliance in accordance with Mont. Code Ann. § 69-3-2004(10). In the CREP Decision, the Court told the District Court to instruct the Commission to "assess *the* penalty against NorthWestern for noncompliance of its CREP obligations for the year 2015 and, if applicable, following further proceedings on remand, for the year 2016." CREP Decision ¶ 76 (emphasis added). The only penalty discussed in the Decision was the penalty provided in Mont. Code Ann. § 69-3-2004(10). When read in the context of the CREP Decision as a whole, the only penalty the Court could have been referring to was the penalty in Mont. Code Ann. § 69-3-2004(10).

22. Furthermore, in the CREP Decision, the Court concluded that NorthWestern's duty to meet the CREP purchase obligation in Mont. Code Ann. § 69-3-2004(3)(b) for compliance year 2015 and 2016 survived repeal of the Act. CREP Decision ¶ 33. In doing so, as MEIC notes, the Court stated, "the saving clause applies to protect *this case* from the repeal of *the Act*." CREP Decision ¶ 33 (emphasis added). *See also id*. ¶ 73 ("The saving clause applies to protect *this case* from the effects of the legislative repeal of *the Act* because NorthWestern's duty to purchase power from CREP resources matured prior to the May 14, 2021, effective date." (Emphasis added.)) "[T]his case" includes consideration of penalties for noncompliance with CREP purchase obligations, as is evidenced by the Court's determination that the District Court wrongly assessed a penalty pursuant to Mont. Code Ann. § 69-3-2004(10) against NorthWestern, *id*. ¶ 72, and the Court's directive that the Commission be instructed to assess penalties for NorthWestern's 2015 CREP noncompliance and potentially assess penalties for the 2016 compliance year, *id*. ¶ 76. Additionally, "the Act" was comprised of Mont. Code Ann. §§ 69-3-2001 through 69-3-2008 and included the penalty provision found in Mont. Code Ann. §

69-3-2004(10). It would be nonsensical to interpret the Court's words as meaning that the CREP purchase obligation found in Mont. Code Ann. § 69-3-2004(3)(b) survived the repeal of the Act but the penalty provision found in Mont. Code Ann. § 69-3-2004(10) did not, especially since the Court carved out no exceptions to the saving clause applying to "this case" and it directed the Commission to assess "the" penalty.

23. The Commission is also persuaded by MEIC's argument in its Reply Brief that the operative duty in this case is NorthWestern's duty to acquire electricity from CREPs, as opposed to the Commission's duty to impose a penalty. MEIC Reply Br. 4–5. The CREP Decision determined that NorthWestern's duties under the Act matured before May 14, 2021. CREP Decision ¶ 31. In that appeal, the Commission argued that no duty to pay a penalty could have arisen from the Commission's order *granting* NorthWestern's requested waivers. *Id.* That argument is practically indistinguishable from NorthWestern's current argument:

> The Commission's duty was to penalize NorthWestern for non-compliance if a short-term waiver had not been granted. The Commission had granted a waiver thereby fulfilling its duty at the time. It was not until the [Montana Supreme Court] later held that the Commission erred, which triggered the Commission's duty to penalize NorthWestern.

NorthWestern Reply Br. 6 (emphasis in original). Like the Commission did on appeal, NorthWestern argues no duty to impose a penalty could mature until the appeals from the Commission's orders were fully resolved. The Court concluded, however, that enforcement of NorthWestern's duty through Commission-issued penalties was immaterial. CREP Decision ¶ 33 ("A duty matures when an entity must complete a legal obligation or requirement, and the ability to enforce vests, regardless of whether the duty is actually enforced."). Accordingly, the ability to assess the penalty provided in Mont. Code Ann. § 69-3-2004(10) was fully vested before the Act was repealed, even though no penalty had actually been assessed. The Commission therefore concludes that the Act's penalty provision survives for purposes of the present case.

II. Is the Commission strictly limited to using information from (or before) the penalty year, or can information available after the compliance year be used to calculate an appropriate penalty?

24. For the reasons discussed below, the Commission concludes that only information from or before March 31 of the year following the CREP compliance year should be used to calculate the appropriate penalty under Mont. Code Ann. § 69-3-2004(10).

25. MEIC asserts that the Commission should use only information from or before December 31, 2015 to calculate the penalty for the 2015 CREP compliance year and from or before December 31, 2016 to calculate any penalty for the 2016 CREP compliance year. MEIC Br. 13-14. The basis for MEIC's assertion is twofold. First, MEIC points to penalty calculations done by Commission staff ("Staff") in footnote 64 of the Staff Memorandum dated August 30, 2018 and notes that Staff used information only from the applicable CREP compliance year or earlier. *Id*. at 13. Second, MEIC points to language in the CREP Decision stating that NorthWestern's CREP obligations "matured at the very latest, December 31 of each compliance year—the latest the Commission could penalize NorthWestern for noncompliance." *Id*. at 14 (quoting CREP Decision ¶ 33). MEIC interprets that language to mean the Commission's duty to penalize NorthWestern under Mont. Code Ann. § 69-3-2004(10) vested as of December 31 of each compliance year and argues that it would therefore be improper to use information developed later than December 31 of each compliance year in calculating penalties for NorthWestern. *Id*.

26. NorthWestern argues that nothing in the law limits the Commission to using information from or before the CREP compliance year in calculating the appropriate penalties. NorthWestern's Opening Br. 8-9. To support its position, NorthWestern notes that the plain language of the penalty provision contains no limitations on what information can be used to calculate appropriate penalties and, in turn, concludes that "the Legislature provided flexibility to the Commission to determine the relevant information necessary to calculate a penalty." *Id*. at 8.

27. In response to MEIC's assertions, NorthWestern asserts that it would violate the rules of statutory construction to establish a specific cut-off date for using information to calculate an appropriate penalty under Mont. Code Ann. § 69-3-2004(10) when none is specified in the penalty provision. *Id*. at 7-8. NorthWestern also asserts that MEIC's claim that the Commission's duty to penalize NorthWestern vested as of December 31 of each compliance year is wrong, and that the Commission's duty, to the extent it ever vested, did not vest until the CREP Decision was issued. *Id*. at 7. NorthWestern additionally asserts that any calculations done by Staff do not bind the Commission. *Id*. at 8-9.

28. The Commission agrees with NorthWestern in several instances. First, as NorthWestern notes, for the purposes of answering the question posed by the parties, the Commission is not bound by the methodology of Staff's penalty calculations as set forth in the August 30, 2018 Staff Memorandum. *In re Appl. of Mountain States Telephone and Telegraph*, Dkt. 88.1.2/88.9.33/88.8.44, Order on Mot. for Reconsideration ¶ 30 ("[O]bviously, staff cannot bind the Commission in any way") (Dec. 26, 1989). Second, the penalty provision is silent as to

what information should or should not be used to calculate an appropriate penalty. Mont. Code Ann. § 69-3-2004(10). Third, that fact, as NorthWestern suggests, indicates the Montana Legislature intended that the Commission decide what information should or should not be used in calculating the penalty under Mont. Code Ann. § 69-3-2004(10).

29. The Commission disagrees with NorthWestern, however, that a certain cut-off date cannot be used for information to be used in calculating the penalty mandated by Mont. Code Ann. § 69-3-2004(10).

30. In the briefing, both parties spend time discussing when the Commission's duty to assess penalties under Mont. Code Ann. § 69-3-2004(10) vested. MEIC's Br. 13-14; MEIC's Reply Br. 6; NorthWestern's Opening Br. 6-9; NorthWestern's Resp. Br. 3-4, 6-7. For the purposes of answering the question posed, however, the Commission notes there is a distinction between when a duty vests and what information may be used to carry out that duty. Accordingly, the Commission finds that the time its duty to assess a penalty vested does not control the cut-off date for information to be used in calculating the penalty mandated by Mont. Code Ann. § 69-3-2004(10).

31. In the absence of a statutory cut-off date and any helpful legislative history,[5] the Commission finds it reasonable to use a cut-off date that coincides with the Commission's deadline for reporting compliance with the Act. The Commission required that NorthWestern file a compliance filing associated with the Act no later than March 31 of the year following the CREP compliance year. *See*, *e.g*., Dkt. N2016.1.3, Letter from PSC to Electric Public Utilities and Electricity Suppliers in Montana (Jan. 8, 2016); Dkt. N2017.1.1, Letter from PSC to Electric Public Utilities and Electricity Suppliers in Montana (Jan. 5, 2017).

32. NorthWestern filed its compliance filing for the 2015 compliance year on March 31, 2016. Dkt. N2016.1.3, NorthWestern's 2015 Renewable Portfolio Standard Compliance Filing (Mar. 31, 2016). In that filing, NorthWestern informed the Commission it had a shortfall of 40.3 megawatts ("MW") for its 2015 CREP purchase obligation and that it intended to seek a waiver from compliance with that obligation. *Id*. at 2, 7. NorthWestern filed its compliance filing for the 2016 compliance year on March 31, 2017. Dkt. N2017.1.1, NorthWestern's 2016 Renewable Portfolio Standard Compliance Filing (Mar. 31, 2017). In that filing, NorthWestern informed the Commission it had a shortfall of 38.8 MW for its 2016 CREP purchase obligation and that it intended to seek a waiver from compliance with that obligation. *Id*. at 2, 7. As of March 31 of the year following the compliance year, NorthWestern therefore had all the

[5] Neither party cites any legislative history in their arguments that helps answer the question posed. MEIC Br.; MEIC Reply Br.; NorthWestern's Opening Br.; NorthWestern's Resp. Br.

information it needed to determine whether it had met its CREP purchase obligation for the compliance year and how far it had fallen short of its obligation.

33. Because as of March 31 of the year following the compliance year NorthWestern had all the information it needed to determine whether it had met its CREP purchase obligation for the compliance year and by how many MWs it had failed to meet its obligation, the Commission concludes there is no compelling reason to use information beyond that date to calculate the penalty under Mont. Code Ann. § 69-3-2004(10).

Rulings

34. In response to the questions posed by the parties in the Joint Motion, the Commission rules as follows:

a. Mont. Code Ann. § 69-3-2004(10) (2019) controls the Commission's assessment of penalties in this case.
b. In this case, only information from or before March 31 of the year following the CREP compliance year may be used to calculate penalties under Mont. Code Ann. § 69-3-2004(10).

DONE and DATED May 20, 2025, by the Montana Public Service Commission, by a vote of 4 to 0, with Commissioner Pinocci not voting.

BRAD MOLNAR, President
JENNIFER FIELDER, Vice President
DR. ANNIE BUKACEK, Commissioner
JEFF WELBORN, Commissioner

CERTIFICATE OF SERVICE

I certify that on May 22, 2025. a true and accurate copy of the foregoing document was served by email to the following:

NORTHWESTERN ENERGY
Charles.lane@northwestern.com
Shannon.heim@northwestern.com
Glenda.gibson@northwestern.com
Sarah.norcott@northwestern.com
Tracy.killoy@northwestern.com
For NorthWestern Energy

EARTHJUSTICE
ahedges@meic.org
jharbine@earthjustice.org

oregnier@earthjustice.org
cnapoli@earthjustice.org
cpepino@earthjustice.org
For EarthJustice

MONTANA CONSUMER COUNSEL
jbrown4@mt.gov
ssnow@mt.gov
For Montana Consumer Counsel

EMAIL LIST(S):
Notification of NorthWestern Energy Filings

By: */s/ Tarin Slayton*
Tarin Slayton
Montana Public Service Commission